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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/873,139	06/01/2001	John P. Scartozzi	AVI-040	3290
21567	7590	01/05/2004	EXAMINER	
WELLS ST. JOHN P.S. 601 W. FIRST AVENUE, SUITE 1300 SPOKANE, WA 99201			LE, HOA VAN	
			ART UNIT	PAPER NUMBER

1752

DATE MAILED: 01/05/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/873,139

Applicant(s)

SCARTOZZI ET AL.

Examiner

Hoa V. Le

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-46 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-46 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 01 June 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.
- a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). ____.
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) ____.
- 6) ☐ Other:

This application is before the examiner for consideration on the merits.

- I. There is application Serial No. 09/996,880 that is a continuation-in-part of this application.
- II. Applicants' prior art submissions filed on 01 June 2001, 08 January and 24 June 2002 have been considered.
- III. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

(A) Claims 1-46 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-300 of U.S. Patent No. 6,387,556. Although the conflicting claims are not identical, they are not patentably distinct from each other because (1) the language "deactivated" fuel cell cartridges in a fuel cell system in the claims are disclosed, taught and suggest to be removable from a operating system in the specification of Patent no. 6,387,556 (figures 1, 2, 3 and their disclosures, col.9:5-26) and well known or conventionally done in the art. It is also well known or conventionally done in the art that a fuel cell cartridge is deactivated before its removal is done. Applicants are urged to show or provide

an evidence to the contrary. This pertinent patent is also found to be sufficient to applied against the claims in application Serial No. 09/996, 880. The counsel for Avista Laboratories fails to make a record in this application and application Serial No. 09/996,880.

(B) Claims 1-46 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-300 of U.S. Patent No. 6,387,556 in view of Spaeh et al (5,532,072) and Walsh (6,110,612). Although the conflicting claims are not identical, they are not patentably distinct from each other because (1) the language "deactivated" fuel cell cartridges in a fuel cell system in the claims are disclosed, taught and suggest to be removable from a operating system in the specification of Patent no. 6,387,556 (figures 1, 2, 3 and their disclosures, col.9:5-26) and well known or conventionally done in the art. Evidence can be seen in Spaeh et al and Walsh at the figures and their disclosures. . It is also well known or conventionally done in the art that a fell cell cartridge is deactivated before its removal is done. Applicants are urged to show or provide an evidence to the contrary. In the absence of convincing evidence, an argument alone may have and be given a little to no value.

IV. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fuglevand et al (6,030,718).

Fuglevand et al disclose, teach and suggest a fuel cell power system comprising a module receiving assembly, a module frame having a cavity to receive multiple fuels, connections, elongated channels 44 and 45 as guides for sliding in fuel cells in figures 2 and 5, ducts for cooling system by an ambient air, controller to operate the system and a movable cell while the system being operable. Please see figures 1-31 and col.3:16-57, 4:31 to 9:3, 22:54 to 23:8, 25:60 to 26:8, 27:59-66, claims 102-131. Since Fuglevand et al disclose, teach and suggest the claimed embodiments, the above claims are found to be rendered prima facie obvious by Fuglevand et al.

V. Claims 1-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fuglevand et al (6,030,718) considered in view of Spaeh et al (5,532,072), Tajima et al (5,541,015), Molloy et al (6,641,947) and Leboe et al (6,649,290).

Fuglevand et al disclose, teach and suggest a fuel cell power system comprising a module receiving assembly, a module frame having a cavity to receive multiple fuels, connections, elongated channels 44 and 45 as guides for sliding in fuel cells in figures 2 and 5, ducts for cooling system by an ambient air, controller to operate the system and a movable cell while the system being operable. Please see figures 1-31 and col.3:16-57, 4:31 to 9:3, 22:54 to 23:8, 25:60 to 26:8, 27:59-66, claims 102-131. It is also known in the art to use sliding materials. Evidence can be seen in Spaeh et al at figures 3 and 6, col.4:18-29. It is also known in the art to use ambient air to cool fuel cells. Evidence can be seen in Tajima et al at figures 1, 2, 3, 4, 5, 6, 7, 8 and their descriptions; Molloy et al at Figures 2, 3 and their descriptions and Leboe et al at figures 4, 5, 6, 7, 8 and their descriptions. Since the above references are related to fuel cells and their systems, it would have been obvious to one having ordinary skill in the art at the time the

invention was made to cite the known materials and their assembly to obtain electrical current and cooling result as disclosed, taught and suggested by the teachings and suggestions in the above applied references in the absence of an unusual or unexpected result for a patentability. Applicants are urged to show it.

VI. Dengler et al, Cheiky and Lin et al as submitted are cited to show the known use of an ambient air to cool a fuel cell system.

VII. Spaeh et al and Walsh as submitted are cited to show the know use of a removable cell while the system being operable and may be next in line as the primary references again the claims in the event that the applied primary reference with respect to Fuglevand et al is overcome. Applicants have not show or provide an evidence to the contrary.

VIII. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Hoa V. Le whose telephone number is 571-272-1332. The examiner can normally be reached on 6:30AM-5:00PM, M-TH.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mark F. Huff can be reached on 571-2721385. The fax phone numbers of the examiner is 571- 273-1332 . Since there is a newly electronic filing procedure for all initial communicating papers and all responses to an Office action, the examiner fax phone number is not for use to receive any fax in response to an Office action. Applicant is requested and required

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to send all initial communicating papers and all response to Office action to a central paper or fax receiving center for an electronic scanning procedure.

Applicants may file a paper by (1) fax with a central facsimile receiving number 703-872-9306,

(2) mail with a central mail receiving address:

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Arlington, VA 22202

For any related question please call Customer Service at 703-308-1202.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

Hoa V. Le
Primary Examiner
Art Unit 1752

HVL
15 December 2003

HOA VAN LE
PRIMARY EXAMINER

